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14
15 **UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 RAHINAH IBRAHIM,

No. 3:06-cv-0545 (WHA)

17
18 Plaintiff,

**DEFENDANTS' RESPONSE TO THE
COURT'S QUESTION REGARDING
SENSITIVE SECURITY INFORMATION**

19
20 v.

21 DEPARTMENT OF HOMELAND
SECURITY, *et al.*,

22
23 Defendants.

1 During the trial on December 5, 2013, the Court requested that Defendants provide
2 additional briefing regarding three questions:

3 **(1) Why Plaintiff’s current status with respect to the No Fly and Selectee Lists is**
4 **Sensitive Security Information (SSI) and therefore cannot be disclosed to Plaintiff herself**
5 **and the public at large;**

6 **(2) Why TSA is able to designate as SSI Plaintiff’s current status with respect to**
7 **both lists even though the Terrorist Screening Center (TSC), part of Federal Bureau of**
8 **Investigation (FBI), determines which individuals should be on the No Fly and Selectee**
9 **Lists; and**

10 **(3) Why Plaintiff cannot be cleared under Section 525(d) to access SSI in this case,**
11 **including her current status.**

12 **I. Plaintiff’s current status with respect to the No Fly and Selectee Lists has been**
13 **designated as SSI in TSA’s regulations.**

14 The Court asked Defendants to provide the statutory and regulatory basis for designating
15 as SSI a person’s status with respect to the No Fly List and Selectee List.

16 Congress directed the Administrator of the Transportation Security Administration (TSA)
17 to prescribe regulations prohibiting the public disclosure of “information obtained or developed
18 in carrying out” transportation security activities if such disclosure “would be detrimental to the
19 security of transportation.” 49 U.S.C. § 114(r)(1)(C). This information is known as Sensitive
20 Security Information (SSI). 49 C.F.R. § 1520.5(a)(3); *see* 49 C.F.R. § 1520.9(a)(2) (providing
21 that SSI can be disclosed “only to covered parties with a need to know”). The regulations list
22 categories of information that TSA has generally determined to be SSI. 49 C.F.R. § 1520.5(b)(1)
23 – (15).

24 Among this information is “[i]nformation and sources of information used by a passenger
25 or property screening program or system, including an automated system.” 49 C.F.R. §
26 1520.5(b)(9)(ii). When TSA revised its regulations in 2004, it expressly determined that a
27 person’s status with respect to the No Fly and Selectee Lists (*i.e.*, on or off) is this type of
28 information, which means that it is SSI and cannot be disclosed to the public. *See* 69 Fed. Reg.

1 28066-1 (2004) (“This is intended to cover . . . lists of individuals identified as threats to
2 transportation or national security.”) Indeed, in this case, TSA has already issued a Final Order
3 that information relating to Plaintiff’s status on or off the No Fly or Selectee lists is SSI. *See* Dkt
4 644-4 (Final Order of TSA).

5 TSA made this determination because a person’s status with respect to either list is
6 information that is “used” by TSA’s passenger screening programs and systems. Two examples
7 help illustrate the point. First, a person’s status with respect to the Selectee List is used to
8 determine how to screen him if he presents himself at an airport security checkpoint. The
9 standard operating procedure governing how TSA’s officers screen passengers at checkpoints is
10 demonstrably a “screening program” within the meaning of 49 C.F.R. § 1520.5(b)(9)(ii). This
11 standard operating procedure contains instructions for how officers should conduct screening
12 when a person who is on the Selectee List presents himself at the checkpoint. To follow those
13 instructions, the officers need to know that the person is on the Selectee List. Thus – quoting the
14 regulation – the passenger “screening program” at checkpoints necessarily “use[s]” a person’s
15 current status vis-à-vis the Selectee List to decide how to screen that person.

16 A second example is how TSA’s Secure Flight program, an “automated system” within
17 the meaning of 49 C.F.R. § 1520.5(b)(9)(ii), “use[s]” a person’s current status with respect to the
18 No-Fly List. Secure Flight matches airline passenger data against the No-Fly List and then
19 automatically and electronically transmits a boarding pass printing result (*i.e.*, print or do not
20 print) to airlines. In order to provide the correct result, Secure Flight must determine whether a
21 passenger is or is not on the No-Fly List. Thus, a person’s No-Fly List status is a fact that is used
22 by an automated screening system.

23 TSA’s determination that a person’s current status with respect to the No Fly and
24 Selectee Lists is SSI is entitled to deference from the judiciary.¹ *See MacLean v. Dep’t of*

25
26 ¹ Importantly, the courts that do have jurisdiction to review TSA’s determination that
27 information is SSI – the courts of appeals – afford a great deal of deference to the agency.
28 Congress has required this deference; 49 U.S.C. § 46110(c) provides that TSA’s findings of fact
are conclusive if supported by substantial evidence and the Administrative Procedure Act, 5
U.S.C. § 706(2)(A), provides that any nonfactual aspects of TSA’s determination must be

1 *Homeland Sec.*, 543 F.3d 1145, 1150 (9th Cir. 2008) (“[W]e must also accord deference to an
2 agency’s interpretation of its own regulations.” (citing *Alhambra Hosp. v. Thompson*, 259 F.3d
3 1071, 1074 (9th Cir. 2001)); *Suburban Air Freight v. Transp. Sec. Admin.*, 716 F.3d 679, 681
4 (D.C. Cir. 2013) (“We must give substantial deference to [the] agency’s interpretation of its
5 own regulations.”) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994))).
6 Several courts have expressly recognized that a person’s current status with respect to the lists is
7 SSI that cannot be disclosed to the public. *See, e.g., Blitz v. Napolitano*, 700 F.3d 733, 737 n. 5
8 (4th Cir. 2012) (“The pertinent regulations deem the following to be sensitive security
9 information that may not be publicly released: . . . the identities of individuals on no-fly and
10 selectee lists[.]” (citing 49 C.F.R. § 1520.5(b))); *Scherfen v. U.S. Dep’t of Homeland Sec.*, No. 3:
11 CV–08–1554, 2010 WL 456784, at *8 n.5 (M.D. Pa. Feb. 2, 2010) (unreported decision)
12 (“Because the TSDB status of Plaintiffs can neither be confirmed nor denied, this Court cannot
13 discuss in this [publicly available] opinion the contents of [documents revealing the plaintiff’s
14 status with respect to the TSDB and No-Fly and Selectee Lists] submitted for in camera
15 review.”). Finally, even if Plaintiff disagrees with TSA’s determination that a person’s current
16 status with respect to the lists is covered by § 1520.5(b)(9)(ii) – or is SSI at all – the Court lacks
17 jurisdiction to review and overturn the determination, as explained below.

18 **II. This Court lacks jurisdiction to decide whether information is or is not SSI.**

19 Only certain government agencies, including TSA, may determine whether information is
20 SSI. TSA’s determination is reviewable by the judiciary, but Congress has expressly specified
21 that the review must occur in a court of appeals. 49 U.S.C. § 46110(a). District courts simply
22 cannot review TSA’s determination that certain information is SSI, even if they disagree with
23 TSA’s determination; believe that TSA has insufficiently explained the rationale for its
24 determination; or do not believe that TSA properly interpreted its regulations in making its
25 determination. *See Chowdhury v. Nw. Airlines Corp.*, 226 F.R.D. 608, 614 (N.D. Cal. 2004)
26 (“Congress has expressly provided that an appeal from an order of the TSA pursuant to [49
27 affirmed unless they are arbitrary and capricious. *See MacLean v. Dep’t of Homeland Sec.*, 543
28 F.3d 1145, 1149-50 (9th Cir. 2008); *Robinson v. Napolitano*, 689 F.3d 888, 892 (8th Cir. 2012).

1 U.S.C. § 114(r)] (non-disclosure of certain information) lies exclusively with the Court of
2 Appeals.” (citing 49 U.S.C. § 46110)); *Elec. Privacy Info. Ctr. v. Dep’t of Homeland Sec.*, 928 F.
3 Supp. 2d 139, 146-47 (D.D.C. 2013) (“[D]istrict courts may not review TSA orders that
4 designate material as sensitive security information.”). Accordingly, district courts cannot
5 determine that information is not SSI, and they cannot order that information that TSA has
6 designated as SSI can be presented to the public during a court proceeding. Indeed, no district
7 court has ever done so.

8 Here, there has been no order from a court of appeals regarding the information in this
9 case that TSA has designated as SSI. Plaintiff did not even seek such an order despite an express
10 invitation from this Court to do so. Accordingly, TSA’s determination that Plaintiff’s current
11 status with respect to the No Fly and Selectee Lists is SSI that cannot be disclosed to the public
12 governs this trial.

13 **III. TSA may designate information as SSI regardless of its origin.**

14 Nothing in the SSI statute, 49 U.S.C. § 114(r), or any other statute limits TSA’s authority
15 to designate as SSI only information that “originated” within TSA. TSA may designate any non-
16 public information, regardless of provenance, as SSI if TSA determines that disclosure of that
17 information would be detrimental to transportation security. A limitation on TSA’s authority to
18 designate information as SSI based on the information’s origin would be impracticable and
19 contrary to congressional intent, which was to ensure transportation and national security.

20 For example, TSA has designated as SSI airlines’ flight attendant manuals, which are
21 written by the airlines. TSA has designated these manuals are SSI because they contain
22 information such as protocols for communication between the flight deck and cabin crew using
23 audio signals. Public disclosure of these would reveal the instructions a flight crew was
24 receiving, which would be helpful for planning and carrying out an attack. It is clear that TSA
25 needs full authority to protect this kind of information from public disclosure in order to protect
26 transportation security.

27 With regard to the No Fly and Selectee Lists, the TSC makes a determination as to whether
28 or not an individual meets the criteria of each list and exports that individual’s identity to the

1 appropriate list. Thus the TSC can be viewed as the “origin” of the fact of a person’s status. But
2 in order for those lists to have any effect, they must be shared with TSA. TSA then uses the lists
3 for its passenger screening programs and systems. It is appropriate, and consistent with TSA’s
4 regulations, for TSA to determine that the lists and their contents are SSI.

5 **IV. Plaintiff herself has not been appropriately vetted and cleared to access SSI in**
6 **connection with this case.**

7 As a final matter, the Court has asked Defendants whether Plaintiff’s current status with
8 respect to the No Fly and Selectee Lists can be provided to Plaintiff herself even if it cannot be
9 disclosed to the general public. The answer to this question is no. For the reasons explained
10 above, TSA has properly determined that Plaintiff’s current status is SSI. SSI can only be
11 disclosed to covered persons with a need to know. 49 C.F.R. § 1520.9(a)(2). Plaintiff, like any
12 other member of the public, is not a covered person with a need to know.

13 Section 525(d) of the Department of Homeland Security Appropriations Act of 2007,
14 Pub. L. No. 109-295, § 525, 120 Stat. 1355, 1381-82 (Oct. 4, 2006), provides that a party *or* a
15 party’s counsel in civil litigation in district court may access SSI subject to the terms of a
16 protective order upon demonstrating a substantial need and completing a criminal and terrorist
17 threat background check. It is clear from the statute’s specification that access may be available
18 to a “party *or* party’s counsel” that Congress contemplated that *both* a party *and* his counsel do
19 not ordinarily have a bona fide need to know SSI at issue in litigation. 120 Stat. at 1382
20 (emphasis added).

21 In this case, Plaintiff has never sought to undergo the required background check, and she
22 has never attempted to demonstrate that she has a substantial need to know her current status
23 with respect to the No Fly and Selectee Lists. Status with respect to the No Fly and Selectee
24 Lists is SSI and is not disclosed to any member of the public. Plaintiff should not be entitled to
25 know her status while every other member of the public cannot know his simply because she has
26 filed a lawsuit.

1 Because Plaintiff has not sought to complete the required background check, and because
2 she has not attempted to demonstrate that she has a substantial need to know her current status,
3 the Court should not order the disclosure of that information to Plaintiff under Section 525(d).²

4 **V. Conclusion**

5 Plaintiff’s current status with respect to the No Fly and Selectee Lists is protected from
6 disclosure by clear statutory and regulatory provisions stating that SSI cannot be disclosed to
7 anyone other than covered persons with a bona fide need to know. Because Plaintiff’s current
8 status vis-à-vis the No Fly and Selectee Lists is SSI, and neither Plaintiff nor the general public
9 are covered persons, Defendants request that the Court continue to close the courtroom during
10 any portion of the trial in which Plaintiff’s current status will be discussed.

11
12 December 5, 2013

Respectfully submitted,

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28 ² Section 525(d) provides that any “order granting access to SSI under this section shall be immediately appealable to the United States Courts of Appeals[.]” 120 Stat. at 1382.